

Exhibit A

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1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK

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3 AHMED ASHOUR, individually and
4 on behalf of all others
similarly situated,

5 Plaintiff,

New York, N.Y.

6 v.

19 Civ. 7081 (AT) (OTW)

7 ARIZONA BEVERAGES USA, LLC, et
8 al.,

9 Defendants.

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Remote Conference

10 March 17, 2021
11 12:00 p.m.

12 Before:

13 HON. ONA T. WANG,

14 District Judge

15
16 APPEARANCES

17
18 REESE, LLP

Attorneys for Plaintiff

19 BY: CARLOS F. RAMIREZ

20
21 PEARSON SIMON & WARSHAW, LLP

Attorneys for Plaintiff

22 BY: MELISSA S. WEINER

23 STEVENS & LEE, P.C.

Attorneys for Defendants

24 BY: ROBERT P. DONOVAN

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1 offered California sales invoices for further inspection.
2 New York invoices can also be furnished, your Honor. As a
3 matter of common sense and proportionality, defendants feel
4 that that's sufficient and proportional for the needs of this
5 case.

6 MR. RAMIREZ: Your Honor, this is Carlos Ramirez.

7 Regarding proportionality, based on my decades of
8 experience litigating these types of cases, the information is
9 as easy as pressing a button on a computer, and we routinely
10 have other defendants in cases where we have alleged nationwide
11 claims produce us that information. It is exclusively in their
12 possession.

13 Like I said, this is information that is readily
14 available by any defendant, especially one as sophisticated as
15 Arizona. And, again, it's really just a matter of pressing a
16 button and downloading it on to an Excel spreadsheet. For that
17 reason, I doubt that the proportionality arguments that
18 defendants raise here are with any merit.

19 MR. DONOVAN: Your Honor, Robert Donovan.

20 I do not want to belabor the point. This is not about
21 pressing a button. This is seeking sales information for over
22 six years in 49 other states. It would be immensely disruptive
23 to defendants' business. The document request requires
24 production of business records. It doesn't require the
25 defendants to create any documentation for the plaintiff.

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1 These are sales invoices. The plaintiff is aware of them. The
2 plaintiff has received sales invoices, volumes of them, and has
3 been offered others for inspection, and it is widely
4 disproportionate based on one plaintiff and three beverages in
5 one state.

6 THE COURT: Okay. I think I am trying to understand
7 why and how you get to nationwide sales data and what
8 specifically is the data that you need. I don't think anybody
9 is arguing that Arizona iced tea is only sold in New York and
10 California. So I guess what I am trying to understand what it
11 is that -- why you need nationwide data now and whether the
12 nationwide data that you are seeking is still at this point in
13 time overbroad.

14 MR. RAMIREZ: Your Honor, this is Carlos Ramirez.

15 We will most likely have anywhere between one to two
16 experts that will opine on the damages in this case, and those
17 experts will require several pieces of information. One would
18 be margin costs or costs of goods sold, and the other one would
19 be the price or the profit. And those are needed because that
20 is the only way we can prove damages. And what they will do is
21 they will take that information from the sale price, they will
22 back out the price of goods sold, and then, from their
23 analysis, they will be able to determine whether that profit,
24 or a portion of that, is attributable to the misleading
25 statements and, accordingly, that would be the damages to the

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1 class.

2 Now, if we get that information for California and
3 New York only, anyone who purchased any Arizona beverages
4 outside of those two states, we will not be able to prove
5 damages for those individuals.

6 THE COURT: Why not? Why not? I mean, are we saying
7 that Arizona iced tea -- that the defendants use a completely
8 different model for making money on these beverages in the
9 other states? I'm trying to understand --

10 MR. RAMIREZ: Well, no. Sure, your Honor. The
11 problem will be that -- so we take that premium and we times it
12 by the number of units sold. So if we don't have the number of
13 units sold for those other states, we will never be able to
14 prove damages. So the damages formula is premium times units
15 sold.

16 If we limit it to California and New York, we will
17 only have units sold information for those two states, leaving
18 the other 48 states out of the computation, and thereby
19 effectively dismissing those claims as to damages for all of
20 those non-New York and California states.

21 And, again, your Honor, this is very, very easily
22 obtained information that every single corporation keeps and
23 they use it in their modeling and in their forecast, and it's
24 really just a matter of pressing a button. It's really as
25 simple as that. It's proportional, and that's the only way we

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1 can get that information from defendants. And under Rule 26,
2 the defendant does have a duty to provide any evidence that
3 may help us establish our claims, and that is clearly one of
4 them.

5 MS. WEINER: Judge, this is Melissa Weiner, if I may
6 just add one point on behalf of plaintiffs.

7 It is the plaintiffs' burden at class certification
8 that I think we are operating on under that basic premise. And
9 at this stage in the litigation, we are in the process of
10 making important strategic decisions in terms of how we will
11 present our case at class certification to the Court. And in
12 order to do that and to prepare our experts and prepare our
13 case, we need certain information.

14 Now, this can come to the Court in several fashions at
15 class certification, either as a complete and final package
16 that says this is what we, in dollars and sense, allege the
17 premium price to be, and here is what we allege the aggregate
18 damage on behalf of the class, or we can proffer a model for
19 calculating damages on a classwide basis.

20 Now, if we propose a model and, again, we have
21 nationwide claims, so we will be moving for both state and
22 nationwide certification of these claims, there is always the
23 "and we can get this data later" if the Court thinks that it is
24 relevant and important for the calculation of damages.

25 I think what we feel nervous in not obtaining the

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1 information now is that we will somehow be prejudiced in two
2 ways, either in response to class certification by saying we
3 didn't uphold our obligation to provide the Court with a
4 feasible method of calculating damages. If we don't have the
5 benefit of the information, we just won't ever know exactly the
6 questions that your Honor posed. Do we know that they
7 calculate price differently? Is it all uniform? Those are the
8 sorts of questions that we would ask in a 30(b)(6) deposition
9 just to ensure that we can say this is all uniform nationwide.
10 Without the benefit of either the actual numbers and the
11 availability of the information as to the nationwide claims, we
12 just simply can't say with testimony under oath one way or the
13 other.

14 Now, if what we are required to do is proceed without
15 that information, then we would simply ask that it not be used
16 against us if it is being held in, perhaps, abeyance for later
17 request, depending on the Court's ultimate determination of
18 class cert.

19 So I think if the Court isn't inclined to provide
20 it -- and I echo my colleague's -- you know, I have experience
21 in class certification and have been appointed to lead many
22 consumer cases across the country, where I have never had
23 nationwide claims at issue and not been provided nationwide
24 data, if we are going to proceed in that way, that we simply
25 not be prejudiced in response because we don't have it.

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MR. DONOVAN: Your Honor, this is --

MR. RAMIREZ: Your Honor --

THE COURT: No, stop. Stop. Stop. Now it's my turn to talk.

All right. Thank you, Ms. Weiner that clears it up a lot.

I am assuming that the motion for class cert. is going to be before me. So, by all means, you should remind me of this, because I would not intend to prejudice you in that way.

My question now is for Mr. Donovan.

Is there some high-level information, whether it is nationwide or broken up by state or geographic region, that is -- that gives pricing information and the number of units sold? Because I think, from there, plaintiffs can certainly show not only the model but can make perhaps strategic determinations on whether they want a nationwide class, whether they want a New York and California class, or just a California class.

The reason why I say this is I am not pushing plaintiffs to limit their class in any way, but I had seen a case where there were nationwide class claims, but I think the plaintiffs ultimately decided that New York and California were the largest states, with the most numerous plaintiffs, and that trying to include, for example, some states with lower population and the like was not going to be worth the effort

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1 after they made a cost-benefit analysis.

2 So I am wondering if defendant has this information
3 fairly readily available, broken out by some either geographic
4 region or state or however you normally keep it, that you could
5 present the pricing information and the number of units sold.
6 Because then I think that would give the plaintiffs at least
7 some handle on whether they want to pursue a nationwide class
8 or whether it just doesn't -- whether it might not make sense
9 to do that. Okay?

10 MR. DONOVAN: Yes, your Honor. This is Robert
11 Donovan.

12 Before I answer your Honor's question or give a
13 response, in our letter, there is reference to the fact that
14 the plaintiffs' claims are for restitution. The request for,
15 quote, profit information and cost information is not relevant
16 to that, and we have also addressed the fact that none of the
17 document requests that are at issue here. None of them have
18 sought cost information. And we have responded to request
19 number 23.

20 But to respond to your Honor's question, I do think it
21 is going to be a laborious task to go through 50 states and
22 have to do a sales by unit summary, and the best evidence of
23 what the prices are of what defendants sell their products are
24 the invoices. But I do think that a summary -- and, again, it
25 would be a summary based on the business records -- of the

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1 sales by unit or by container or by case for California and for
2 New York could be organized, but the other 48 states, to have
3 to do that is just burdensome and, again, disruptive because it
4 will have to go through the records of the business to make
5 sure there is going -- there is going to be a representation,
6 you know, in these records that they are accurate and, again,
7 they are going to be a summary of business records. And I
8 presume there will be discovery about that, who created the
9 summary? How was it created?

10 So I don't know whether I answered your question or
11 not, your Honor, but I do think, with regard to California and
12 New York, there could be a sales by unit summary by container
13 or by case, and the invoices would show what the prices are
14 that they sell to their various customers.

15 MS. WEINER: Your Honor, if I may? This is Melissa
16 Weiner, if I might respond to Mr. Donovan.

17 A couple of issues:

18 The first is, Mr. Donovan is speaking in terms of
19 Arizona's records and its sale of cartons, and we are talking
20 in wholesale prices. And he has raised restitution and, again,
21 I highlight, this is plaintiffs' burden at class certification
22 to demonstrate to the Court that there has been a premium price
23 charged or a willingness to pay a certain price that they
24 wouldn't otherwise have paid had they known the deception, very
25 simple consumer class-action allegations here.

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1 And Mr. Donovan, respectfully, is telling us what we
2 need and don't need in order to do that, and I have personally
3 spoken with our expert, because we are trying to front -- we
4 are trying to give as much information, which, by the way, is,
5 I think, a little bit challenging for the plaintiff to
6 disclose some of our strategies and why we think we need what
7 is otherwise in our experience very, very typical information
8 that is produced, we have explained why we need these things.

9 Now if we don't get them, we do have alternative ways
10 that we can, you know, proceed with a damages calculation. But
11 what Mr. Donovan is talking about is information that in 99
12 percent of the cases that I prosecute is provided in a chart
13 simply in a rog response. We are not asking for thousands of
14 pages of internal records showing every carton or every sale
15 made.

16 But, regardless, the information Mr. Donovan is
17 talking about is with regard to wholesale Arizona sales of the
18 products to third-party distributors who then put it on the
19 shelf, right? So we have two different buckets. We have that
20 information, and then we have end user data, and we haven't
21 right on this conference today talked about the end user. The
22 consumer buys the product off the shelf, and there are third
23 party aggregators of all of this data, IRI, Nielsen, the Court
24 is probably familiar with these either from prior cases or
25 just, you know, from the news, where they go out and they

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1 take -- you know, they calculate -- they are counting all the
2 transactions, and they essentially average across all of the
3 nation the average sales price. There is all sorts of
4 information that exists out there by third-party aggregator
5 sales data.

6 And I think the Court can appreciate, we are really
7 trying to come up with ways that are less burdensome. We don't
8 agree with the -- we think that proportionality is being overly
9 used here. This is, without question, relevant information at
10 the core of this case.

11 But again, even taking that to heart, we are trying to
12 pivot here and find different avenues. Okay, fine, don't give
13 us every internal business document. Let's get a summary. We
14 really are trying to be reasonable. Third-party aggregator
15 data was just produced to me in a very similar case literally
16 by one-page attachment with a chart.

17 So I want to highlight for the Court that this case is
18 not different than all of the consumer cases where this
19 information is very easily and readily available, and I have
20 just never seen this become such a huge issue, again, to a core
21 component of our burden at class certification. And I don't
22 want to belabor it, Judge, but this is why we are not just
23 giving in. If Mr. Donovan is going to tell us that costs of
24 goods sold are not relevant to our damages calculation, then,
25 you know, just to forewarn the Court that you will be hearing

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1 from us if there are any arguments that undercut our damages
2 expert analysis because we weren't given that information and
3 here we are, you know, crying for help, if you will.

4 THE COURT: Okay.

5 MR. DONOVAN: Judge, this is -- your Honor? Your
6 Honor?

7 THE COURT: No, no.

8 MR. RAMIREZ: Your Honor --

9 MR. DONOVAN: Your Honor --

10 (Indiscernible crosstalk)

11 MR. RAMIREZ: Your Honor --

12 THE COURT: No.

13 MR. RAMIREZ: Can I please -- I'm --

14 THE COURT: No.

15 MR. RAMIREZ: Okay. I just wanted to clarify
16 something for the record.

17 THE COURT: No. No. Should I mute you? I can mute
18 you right now if you'd like.

19 MR. RAMIREZ: No. No, your Honor.

20 THE COURT: All right.

21 I want to follow up on something that Ms. Weiner just
22 said about cost of goods sold. Why is the cost of goods sold
23 not the same across states?

24 MS. WEINER: Judge, are you asking me?

25 MR. DONOVAN: Your Honor, this is Robert Donovan. Is

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1 factors, *i.e.*, cost of goods sold, profits, was a problem, and
2 they decertified a class based on the fact that they didn't
3 consider supply side factors, which is effectively what
4 defendants will probably argue if we get to that stage.

5 So for that reason, we do -- we do need -- we also do
6 need the marginal costs or whatever it is it costs them to make
7 the product, so we can back that out of the damages
8 calculation.

9 THE COURT: All right. And so the cost of goods
10 sold -- this is for Mr. Donovan. The cost of goods sold has
11 already been provided for California, no?

12 MR. DONOVAN: Your Honor, it was never even requested
13 and, no, it hasn't been provided. It is not relevant to the
14 plaintiffs' damage claims.

15 THE COURT: All right.

16 MR. DONOVAN: There is --

17 (Indiscernible crosstalk)

18 MR. RAMIREZ: Your Honor, it was requested --

19 THE COURT: Stop it. I'm muting all of you if you
20 don't stop it right now.

21 So, defendants, here is how I am going to rule, all
22 right? You are going to provide the California and New York
23 data and nationwide as a whole. How you get that information
24 doesn't really matter to me. Okay? It sounds like you might
25 be able to get that information through a third-party

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1 aggregator if you don't already subscribe to that information.
2 And if you are going to continue to fight about this, I will
3 allow -- I encourage you not to continue to fight about this,
4 but I have already told plaintiffs that I will consider a
5 model. It seems to me that if you have essentially the same
6 types of numbers for California, New York, and nationwide, you
7 can put together something pretty robust.

8 To the extent that there -- that what you get you feel
9 is insufficient for you to make your -- to show how you would
10 prove damages, I would like to defer that. That's a fancy
11 court term for kick the can down the road. And I would like to
12 see a motion if you need more granular data than that, but then
13 a motion will have to explain to me why the data that you have
14 is insufficient. Okay? But I also encourage you to try to
15 work together on this.

16 One final question for Ms. Weiner, since you were the
17 one who brought up and explained to me how the third-party
18 aggregators work in terms of providing data, is if there is --
19 if there are -- I understand this is a very broad ruling. If
20 there are details that you cannot work out among each other, I
21 would like a joint letter explaining to me what the problem is,
22 okay? But let's see what you get from California, New York,
23 and nationwide on this fairly high-level data.

24 Mr. Donovan, I don't care how your client gets it,
25 whether they do it themselves or whether they, in fact,

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1 subscribe to a third-party aggregator, in which case it should
2 actually be fairly simple, because it sounds like the cost of
3 goods sold is probably something that wouldn't be available
4 from a third-party aggregator and would only be available
5 through your client, and it sounds like the cost of goods sold
6 is necessary for calculating the premiums. Is that right?

7 MS. WEINER: So, Judge --

8 MR. RAMIREZ: Yes, your Honor. This is Carlos
9 Ramirez.

10 MS. WEINER: Well, so I guess I -- at class
11 certification, what we are required to do is show the Court
12 that there is a feasible model for calculating damages
13 classwide. Now, if I don't know the exact number for cost of
14 goods sold, we will make, again, certain assumptions regarding
15 maximization of profit, things that are just obvious in a CPG
16 world.

17 So I don't want to represent to the Court that without
18 it we are just hamstrung, because I think we make assumptions
19 all the time. There are plenty of cases where I am told "we
20 don't know," which, of course, to our economic expert seems
21 crazy, but if it is what it is, then there are things that we
22 do in economics to make assumptions based upon maximization of
23 profit.

24 So I guess, and I agree with the Court that a joint
25 letter, you know, explaining if we have any remaining issues on

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1 especially this issue on sales data, which is pretty cut and
2 dry, you either have it or you don't, you are willing to
3 produce it or you are not. Request 23 is really simple, it is
4 just average wholesale prices and average retail prices.

5 Again, the two buckets. The wholesale prices are what
6 did Arizona sell it to third-party distributors? How many of
7 those did you sell? And then the retail is how many of those
8 were sold off the shelf. The third-party aggregator comes in
9 in bucket B.

10 So I think that at least if we can get to or have
11 commitment leaving here today, Judge, because we have,
12 admittedly, have had some struggles in meet-and-confers, that
13 we can at least get to the bottom of do you have it and are you
14 willing to produce it, then we can come back to the Court --
15 hopefully not, but if need be -- with an understanding like we
16 just don't have it or here are the three reasons why we just
17 don't think you get it.

18 MR. DONOVAN: Your Honor, if I may? This is Robert
19 Donovan.

20 I understand your Honor's ruling to be that the
21 California, New York, and nationwide aggregate data, which I
22 understand to be the IRI and/or Nielsen data, to the extent
23 that it is responsive to request number 23, would be produced.
24 Am I correct that that's what the information means, your
25 Honor?

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1 THE COURT: Yes.

2 MR. DONOVAN: And with respect to cost of goods sold,
3 I do not understand the Court ruling on that. That is -- there
4 hasn't been any -- respectfully, your Honor, just argument of
5 counsel as to what cost of goods sold, how it was relevant,
6 what it means.

7 THE COURT: Okay.

8 MR. DONOVAN: It's not in request 23, but I don't
9 understand the Court's ruling to --

10 THE COURT: My ruling on that is that you are going to
11 meet and confer and decide whether you need this now or
12 whether, as Ms. Weiner said, it is possible to show a feasible
13 model for calculating nationwide damages without it, or if you
14 don't actually have it -- and, by the way, cost of goods sold
15 is something that most companies do estimate in some way or
16 they collect some data that makes it possible to estimate it,
17 okay? So I also don't want to hear from defendants' side that
18 you are completely hamstrung and you have no idea what this
19 term means, okay?

20 But on the cost of goods sold issue, I want you to
21 meet and confer and see if you can resolve it among yourselves.

22 All right. I have another thing at 1:00, so I am
23 really trying to get through this quickly.

24 I think -- I definitely encourage you to review the
25 transcript and review what we have talked about and process it